

## IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 63729-1-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
KYLE EDWARD PINNEY,	)	UNPUBLISHED OPINION
	)	
	)	
Appellant.	)	FILED: July 26, 2010
_____	)	

Leach, A.C.J. — During Kyle Pinney’s murder trial, a detective testified in rebuttal that a postarrest interview with Pinney ended when he said “maybe I should have an attorney.” Pinney appeals his conviction for second degree murder, arguing that the prosecutor’s questions and the detective’s answers impermissibly commented on his right to remain silent. Because the defense opened the door to the topic, the challenged questions and answers were proper rebuttal and any error was invited. Accordingly, we affirm Pinney’s conviction.

Pinney also argues, and the State concedes, that the trial court failed to satisfy the statutory prerequisites for a sentence condition requiring him to obtain a mental health evaluation. We accept the concession and remand for the court to strike the condition.

### FACTS

Based on evidence implicating Pinney in the fatal shooting of Stephen Brewer,

the State charged him in the alternative with first and second degree murder.

At trial, Detective Frederick Yohann of the Renton Police Department testified that he and Detective Keith Hansen interviewed Pinney following his arrest. Pinney initially told them that other people were lying and conspiring against him. The detectives responded that this story “wasn’t going to fly.” Shortly thereafter, they ended the interview and took Pinney to the jail. The prosecutor did not ask, and Detective Yohann did not say, why the interview ended.

Detective Yohann further testified that on the way to the jail, Pinney volunteered “something about mentioning to his attorney about a self defense defense.” According to Yohann, this was the first time Pinney had mentioned self defense.

On cross-examination, defense counsel attempted to establish exactly when Pinney first mentioned consulting with an attorney about self-defense. In the process, she elicited testimony that the interview ended because Pinney “asked for an attorney.”

Pinney testified and claimed he shot the victim in self-defense. He conceded that he initially lied to the detectives but told them on the way to the jail that he would “talk to them about self defense” after he talked to his lawyer. On cross-examination, the prosecutor questioned Pinney about the circumstances surrounding the interview, including his remarks about counsel and whether the detectives suggested self-defense before Pinney first mentioned it.

The State then called Detective Hansen in rebuttal.<sup>1</sup> During the following

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<sup>1</sup> The State informed the defense during Pinney’s cross-examination that it

exchange, the prosecutor and Hansen each made several references to Pinney's interest in consulting counsel:

A. I told him that nobody was going to believe this, and I said, "You might as tell us that you did it, but make up a reason," and then I said, "Like Stephen started to fight with me."

. . . .

Q. — . . . how did Mr. Pinney respond to that?

A. He went right back to the conspiracy, "Everybody is making up this story about me."

Q. So he didn't make any comments at all about this statement you just made to him about maybe claiming self defense or that Stephen started the fight?

A. No.

Q. How much longer did the conversation last with Mr. Pinney there after you made that statement to him?

A. You know, it didn't go on very much longer, and then he said, again, "Well, maybe I should have an attorney."

Q. So, when he said to you, "That maybe I should have an attorney," what did you guys do at that point?

A. We just ended the interview at this time.

Q. And why is that?

A. Because we had already explained to him once, you know, that -- earlier in the interview, he had already said something, "Well, maybe I should have an attorney." And I think it was Detective Yohann explaining to him the rules we played by, and told him that if he wants an attorney, you know, to tell us, and we'll stop the interview. We have to stop the

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intended to call Hansen in rebuttal "because . . . the defendant mischaracterized the conversation the two of them had." Defense counsel conceded that this would be "proper rebuttal."

interview.

Q. Okay.

A. And he started, he started talking again.

Q. About this conspiracy theory?

A. About, about the conspiracy.

Q. Okay.

A. So then the second time when he did that, we thought, "No, let's just end it." So we just ended the interview.

Q. And say the rules you play by, if you look at what's marked as State's Exhibit 70, it says, "I have the right to talk to an attorney before answering any questions. I have the right to have an attorney present during the questioning. I have the right to remain silent, and I have the right to an attorney."

And it also says, "I further understand that I have the right to exercise any of these rights at any time before or during questioning."

So is that exactly what he was doing; he was exercising his right to a lawyer, and that's why you stopped the interview?

A. Yes. Well, he hadn't actually exercised it. He was, he was again asking, asking us or making a statement, "Well, maybe I should have an attorney."

Q. All right. So—

A. But for us, that was the—we had already explained it once, and we thought it best just to end it there.

On the way to the jail, Pinney spontaneously said, "Maybe I should talk to my attorney about this self defense thing." This was the only time Pinney mentioned self-defense.

In closing argument, the prosecutor did not mention Pinney's custodial interview until after defense counsel broached the topic. Defense counsel argued that Pinney told the detectives he wanted to see an attorney to discuss self-defense. In rebuttal, the prosecutor argued that self-defense became an issue for Pinney only after Detective Hansen suggested that possibility.

The jury convicted Pinney of second degree murder. He appeals.

### DECISION

Pinney contends the prosecutor violated his rights to due process and to remain silent by asking Detective Hansen several times whether, after receiving Miranda<sup>2</sup> warnings, he requested counsel. According to Pinney, the questions and answers impermissibly commented on his right to remain silent and require reversal. The State, on the other hand, contends the questions and answers were invited and/or permissible because Pinney's counsel opened the door to the subject during her earlier cross-examination of Detective Yohann. We agree with the State.

It is normally improper for counsel or a witness to comment on a defendant's silence.<sup>3</sup> But the State may elicit such testimony in rebuttal if the defense first opens

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<sup>2</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

<sup>3</sup> State v. Jones, 111 Wn.2d 239, 248-49, 759 P.2d 1183 (1988).

the door to it.<sup>4</sup> This is “[b]ecause . . . ‘it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another.’”<sup>5</sup> In addition, once the door is opened, the doctrine of invited error precludes the defendant from raising the issue on appeal.<sup>6</sup>

Here, the State contends, and Pinney does not dispute, that the questions and answers during Detective Hansen’s testimony were permissible rebuttal and/or invited error because defense counsel opened the door to the topic in her earlier cross-examination of Detective Yohann. The genesis of Pinney’s self-defense claim and whether it was fabricated were important issues at trial. The evidence established that Pinney brought up self-defense in the interview by announcing his intent to consult an attorney about it. During her cross-examination of Detective Yohann, defense counsel elicited testimony that Pinney asked for an attorney during the interview with the detectives. She then attempted to establish the point at which “he asked for an attorney and mentioned that he would be looking at the self defense defense.” This questioning opened the door to further exploration of when and how Pinney raised the self-defense/counsel issue.<sup>7</sup> The prosecutor’s questions and Detective Hansen’s

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<sup>4</sup> State v. Stackhouse, 90 Wn. App. 344, 359, 957 P.2d 218 (1998) (citing Jones, 111 Wn.2d at 248-49); United States v. Robinson, 485 U.S. 25, 32-33, 108 S. Ct. 864, 869, 99 L. Ed. 2d 23 (1988)); cf. State v. Vargas, 25 Wn. App. 809, 812, 610 P.2d 1 (1980) (by testifying he cooperated fully, defendant opened the door to testimony that he refused to give a statement at one point); accord State v. Kendrick, 47 Wn. App. 620, 629-31, 736 P.2d 1079 (1987).

<sup>5</sup> Stackhouse, 90 Wn. App. at 359 (quoting Robinson, 485 U.S. at 33).

<sup>6</sup> See, e.g., State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990); City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002).

<sup>7</sup> A party may examine a witness within the scope of the opposing party's

answers on rebuttal were therefore permissible, and any error was invited.

Furthermore, contrary to Pinney's assertions, neither the prosecutor's questions nor Detective Hansen's answers amounted to a "comment" on his right to remain silent. Our courts distinguish between comments on, and mere references to, a defendant's silence.<sup>8</sup> "A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt."<sup>9</sup> Here, the prosecutor never suggested that Pinney's references to counsel were evidence of guilt and made no mention of them in closing argument. There was no comment on Pinney's right to remain silent.

Pinney also argues, and the State concedes, that the community custody condition requiring him to obtain a mental health evaluation and any recommended treatment must be stricken. Former RCW 9.94A.505(9) (2006) authorizes the court to order a mental health evaluation as a condition of community custody when it follows specific procedures. The court must find reasonable grounds to believe that the offender is a mentally ill person as defined in RCW 71.24.025 and that the mental illness likely contributed to the offense.<sup>10</sup> The order must be based on a presentence report and, if applicable, mental status evaluations.<sup>11</sup> Because the court did not comply

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previous examination. State v. Jones, 26 Wn. App. 1, 8-9, 612 P.2d 404 (1980).

<sup>8</sup> State v. Slone, 133 Wn. App. 120, 127, 134 P.3d 1217 (2006); State v. Pottorff, 138 Wn. App. 343, 346-47, 156 P.3d 955 (2007).

<sup>9</sup> State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

<sup>10</sup> Former RCW 9.94A505(9); State v. Jones, 118 Wn. App. 199, 209, 76 P.3d 258 (2003).

<sup>11</sup> Jones, 118 Wn. App. at 209.

with any of these requirements, we accept the concession of error and remand for the court to strike the condition from the judgment and sentence.

Affirmed in part and remanded in part.

Leach, a.c.j.

WE CONCUR:

Schneider, J.

Becker, J.